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Lake Mary Health Care Associates, LLC d/b/a Lake Mary Health and Rehabilitation and Service Employees International Union, Florida Healthcare Union, Local 1999.¹ Case 12–CA–24810

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 12, 2006,² the General Counsel issued the complaint on January 25, 2006, alleging that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to bargain following the Union's certification in Case 12–RD–978. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting an affirmative defense.

On February 17, 2006, the General Counsel filed a Motion for Summary Judgment. On February 22, 2006, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.³ The Respondent filed a response and a cross-motion for summary judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the ground that the Board erred in setting aside the initial

election, based on the Union's objection, and directing a second election.⁴

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the General Counsel's Motion for Summary Judgment.⁵

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Florida corporation with its principal office and place of business located in Lake Mary, Florida, has been engaged in the operation of a nursing home. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of \$100,000, and purchased and received at its Lake Mary, Florida facility goods valued in excess of \$50,000 directly from points located outside the State of Florida.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Service Employees International Union, Florida Healthcare Union, Local 1999 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the second election held October 28, 2005, the Union was certified on November 10, 2005, as the

¹ The name of the Union reflects the merger of Service Employees International Union, Local 1199 into Service Employees International Union, Florida Healthcare Union, Local 1999. This name was on the Notice of Election and ballots in the election in which the Union was certified.

² Although the Respondent states in its answer to the complaint that it is without knowledge as to when a copy of the charge was served, it is clear from the exhibits attached to the General Counsel's motion that the charge was filed and served as alleged. The Respondent has not challenged the authenticity of those exhibits.

³ On February 27, 2006, the General Counsel filed a correction to his Motion for Summary Judgment.

⁴ The Board's decision setting aside the initial election and ordering a rerun election is reported at 345 NLRB No. 37 (2005).

⁵ The Respondent's cross motion for summary judgment is therefore denied.

Member Schaumber dissented from the ordering of a second election in the underlying representation case and would have found that the Respondent did not engage in objectionable conduct warranting a new election. 345 NLRB No. 37, slip op. at 4-6. While he remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Member Schaumber agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants, non-certified nursing assistants, dietary employees, cooks, housekeeping employees, laundry employees, and floor techs employed by the Employer at its Lake Mary, Florida facility; excluding: all other employees, office clerical employees, confidential employees, professional employees, technical employees, Licensed Practical Nurses, Registered Nurses, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about November 17 and December 1, 2005, the Union, by letters, requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the certified unit. Since about November 22, 2005, the Respondent has failed and refused to recognize and bargain with the Union.

CONCLUSION OF LAW

By failing and refusing since November 22, 2005, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Lake Mary Health Care Associates, LLC d/b/a Lake Mary Health and Rehabilitation, Lake Mary, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Service Employees International Union, Florida Healthcare Union, Local 1999, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time certified nursing assistants, non-certified nursing assistants, dietary employees, cooks, housekeeping employees, laundry employees, and floor techs employed by the Respondent at its Lake Mary, Florida facility; excluding: all other employees, office clerical employees, confidential employees, professional employees, technical employees, Licensed Practical Nurses, Registered Nurses, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Lake Mary, Florida, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 28, 2006

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| Robert J. Battista, | Chairman |
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| Wilma B. Liebman, | Member |
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| Peter C. Schaumber, | Member |
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Service Employees International Union, Florida Healthcare Union, Local 1999, as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time certified nursing assistants, non-certified nursing assistants, dietary employees, cooks, housekeeping employees, laundry employees, and floor techs employed by us at our Lake Mary, Florida facility; excluding: all other employees, office clerical employees, confidential employees, professional employees, technical employees, Licensed Practical Nurses, Registered Nurses, guards and supervisors as defined in the Act.

LAKE MARY HEALTH CARE ASSOCIATES, LLC
D/B/A LAKE MARY HEALTH AND
REHABILITATION